Supreme Court, U.S.
FILED

94 221 JUN 27 1994

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
TERM OCTOBER 1994

ROBERT C. DOWNER, PETITIONER

VS.

ELDON HANNEMAN AND PATRICIA
HANNEMAN, HUSBAND AND WIFE
AND
MAXINE V. SWENSON, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

Upon consideration of the following 3 events;

(1) In 1965 petitioner resurveyed patented land as directed by government Manual of Surveying Instructions, 1947, Sec. 359 and 562; and,

(2) In 1988 Interior Board of Land Appeals, in IBLA 86-45 (1988) page 1, adopted "substantial evidence" standard for resurveys,

(3) In 1994, the Supreme Court of the State of Nevada, in Case No. 23434, on page 13, decided that petitioner's 1965 resurvey was negligent, citing the 1988 "substantial evidence" standard;

QUESTION. Has petitioner been denied due process of law by the Court's judicial error of law, and of fact, by applying a 1988 standard to a 1965 survey to decide that it was performed negligently?

QUESTION. Has petitioner been deprived of due process by court's use of the "substantial evidence" standard, (I.B.L.A. 86-45, 1988, page 1), which conflicts with the U.S. Supreme Court decision in Cragin V. Powell, (128 U.S. 691, 696.) and with 1947 Manual, Secs. 359 and 562, to find petitioner's 1965 survey negligent?

QUESTION. Should this conflict of federal standards be settled by Supreme Court of the United States?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings.

ERRATA - Page ii, first paragraph should read "Findings", Page 18, line 22.

The QUESTION arises in the District Court, Case No. 15029. Judge Fondi. "Findings..." Page 18, line 1. "Downer argued that his actions must be evaluated on the basis of the information available to him in 1965."

However, Judge Fondi decides Downer's "negligence" based on "substantial evidence" identification standard as set forth in IBLA 86-45 1988.

QUESTION again arose in Nevada Supreme Court Case 23434, in Downer's Opening Brief, Page 16, line 3. "The Board then found against Downer's survey; not based on any negligence of Downer but because they concluded there was "substantial evidence" to support the position of the BLM..."

Downer's reply Brief. Page 22, line 24.

"Nowhere in the 1947 Manual is the substantial evidence test for monument identification even mentioned...Downer cannot be held negligent because of the imposition, years later, of that standard."

Court did not address above arguments.

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App. F Decision, Interior Board of Land Appeals. May 8, 1987.

App. G Findings and Conclusions, Interior Board of Land Appeals. 84-762.

Appendix appears in separate binding.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada, was filed on March 30, 1994.

This Court's jurisdiction is invoked under Title 28, U.S.C. Sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth below.

Amendment XIV, Sec. 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

AUTHORITIES CITED

"It is a well settled principle that when lands are granted according to an official survey of such lands, the plat itself, with all of its notes, lines, descriptions and landmarks, become as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." Cragin V. Powell (128 U.S. 691, 696) (See 1947 Manual, Sec. 562)

"It is a matter of utmost importance to determine where an identified call of the original field notes shall operate to control for both latitude and departure, or for either coordinate by itself, and finally as to the necessity for applying the rules of proportionate measurement where the distance between the identified points is considerable." BLM "Manual of Surveying Instructions, 1947. Section 359.)

"...the validity of a retroactive statute is determined by whether it impairs contractual obligations, violates due process, disturbs vested rights, or conflicts with any other constitutional provision or fundamental right." 16A C.J.S., Par. 416, Page 96.

"Presumptive invalidity." ..."laws that attempt retroactively to create liability in a relation as to which no liability previously had attached, although not necessarily unconstitutional, are generally so arbitrary, harsh and oppressive as to be regarded presumptively invalid."
N.Y. - Application of Bailey, Sec. 7N, Y.S. 2nd 746. 265 App. Div. 758 Affirmed 50 N.E. 2nd 653, 291 N.Y. 534.

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ROBERT C. DOWNER
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RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Robert C. Downer, respectfully prays that writ of certiorari issue to review the judgement and opinion of the Supreme Court of the State of Nevada, affirming, in part, the judgement of the Ninth Judicial District of the State of Nevada.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada, Case No. 23434, appears in Appendix A of this Petition.

The opinion of the Ninth Judicial District Court of the State of Nevada, in and for Douglas County, appears in Appendix B to this Petition. Case No. 15029, Dept. 1.

The decision of Interior Board of Land Appeals 86-45 (1988) appears in App. E to this Petition.

The decision of Interior Board of Land Appeals 86-45 (1987) appears in App. F to this Petition.

Findings and Conclusions, IBLA 84-762 (1985) appears in Appendix G of this Petition.

STATEMENT OF THE CASE

In 1965 Stoddard Jacobsen employed Petitioner, a licensed land surveyor, to divide a portion of his land into large lots. The property was part of a patented homestead granted to William Carter in 1882. The land is mountainous and forested.

Petitioner first obtained, from the BLM office in Reno, copies of the field notes and plat of all official government surveys in the area, beginning in 1881. The current "Manual of Surveying Instructions, 1947", was Petitioner's authority for resurvey methodology.

Jacobsen's land was bordered on the north by the north line of Sec. 9, T.11N., R.21E., Mt. Diablo Base and Meridian. It was bordered on the west by the curving alignment of Highway 395. Only one original section corner, for which the evidence was "fully conclusive", was found in a distance of over two miles. Therefore the methodology in Sections 353 to 359 and 562 were used for retracement of the north boundary, using calls and distances in 1881 field notes. Two monuments were found but rejected due to drastic deviation from record. By contrast, Petitioner's boundary agrees closely with record, and conforms with the 1947 Manual.

Petitioner rejected these monuments which were "not fully conclusive", and notified the Highway Dept. of the situation. Petitioner then set property corners on the true line and filed his map with the County Recorder.

About ten years later Hanneman, the Respondent in this case, became owner of a lot bordering on the north boundary.

About 1982 a mining company surveyor adopted the corners which Petitioner had rejected, and informed Hanneman that his building and several acres had been cut off.

The BLM survey crew, called in to investigate the conflict, also accepted the corners which Petitioner had rejected. Petitioner filed a protest with BLM. Protest was dismissed by BLM. Petitioner appealed to Interior Board of Land Appeals. IBLA, in 85 IBLA 335, 342 (1985) "concluded that appellant had raised a "substantial question of fact whether the BLM retracement of the boundary in dispute was accurate." A hearing by an Administrative Law Judge was deemed appropriate.

Judge L.K. Luoma conducted hearings and a field inspection. He concluded, "there seem to be so many deviations from the original calls and distances in the BLM resurvey as to cast

doubts on its accuracy" and remands case to BLM for a resurvey.

Both Petitioner and BLM appeal from Judge Luoma's decision for lack of specificity on how to conduct a resurvey. An IBLA 3-judge panel rules on the appeals. Their decision on May 8, 1987 affirms Judge Luoma's decision, and states that "Appellant's evidence generally supports the accuracy of the 1881 survey. The evidence of discrepancies presented by BLM almost makes a case for a fraudulent survey." And "the case is remanded to BLM for further action consistent herewith."

BLM petitions for reconsideration of Board's decision requiring resurvey. In IBLA 86-45, on June 8, 1988, the Board grants the petition and announces "The proper standard for the BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence, 'substantial evidence' is such relevant evidence as a reasonable man might accept as adequate to support a conclusion." They then accepted the corners which Petitioner had rejected.

Appeals to Federal District Court, Nevada and to Ninth District Court of Appeals were dismissed for lack of standing, because Petitioner was not an owner. There was no dis-

cussion of the merits of the survey case.

In Hanneman vs. Swenson, Downer and Jacobsen, in the Ninth District Court of the State of Nevada, in and for the County of Douglas, Judge Fondi, March 27, 1992. Findings, Conclusion and Judgement. Statement on page 7, line 14. "The Board held that the proper standard for the BLM to apply to establish the monuments for use in a resurvey was to consider a corner existent (or found) if such a conclusion was supported by substantial evidence. The Board then applied the substantial evidence standard to the BLM survey evidence and decided that the BLM had established all the survey monuments." Obviously this new, less demanding, standard changed the rules, to enable acceptance of BLM's survey and rejection of Downer's.

In the present case No. 23434, being appealed by Petitioner from the Supreme Court of the State of Nevada, the Court states, on page 13, "We conclude that substantial evidence supports the District Court's determination that Downer failed to meet the requisite standard of care. Obviously, the new rules were again applied to accept BLM's survey and to reject Downer's 1965 survey, even though it is in compliance with the more demanding requirements of the 1947 "Manual of Surveying Instructions".

From the preceding series of proceedings in this case the chronology of events is clear:

1965 - Resurvey of north boundary by Petitioner. Due to patented land, survey is controlled by Secs. 359 and 562 of 1947 Manual.

1988 - In IBLA 86-45 (1988) Board establishes "substantial evidence" as proper standard. This standard is not mentioned in the 1947 Manual which Petitioner was required to use in 1965.

1992 - In the Ninth Judicial District Court of the State of Nevada, in and for Douglas County. Judge Fondi decision on page 7. "The Board held that the proper standard was... "substantial evidence. The Board then applied the substantial evidence standard to the BLM evidence and decided that the BLM had established all the survey monuments..." Obviously, this ambiguous standard was not available to Petitioner in 1965.

1994 - In the Supreme Court of the State of Nevada, opinion filed March 30, 1994. Statement on page 13. "We conclude that substantial evidence supports the District Court's determination that Downer failed to meet the requisite standard of care..."

Petitioner's survey, in 1965, complied with the 1947 Manual, which does not contain the "substantial evidence" standard, but, instead, establishes strict rules for retracement of boundaries. Obviously, the Court is imposing the 1988 "standards" on Petitioner's 1965 survey to decide that it is negligent.

Petitioner believes that retroactive application of the 1988 standard on the 1965 survey, by the Court, to discredit his 1965 survey methods is contrary to proper legal procedures, and deprives him of due process of law, thus violating the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari here to rule that Petitioner's due process rights have been denied, as described, and to resolve the conflict between IBLA's 1988 "substantial evidence" standard and the standard for patented land boundary retracement described in the 1947 Manual, Sections 353-359, and 562, and also with the 1973 Manual, Section 5-9, which conflict has been so costly in time and money and stress, to all parties involved.

CONCLUSION

For the reasons set forth above, the writ of certiorari should issue to review the judgement and opinion of the Supreme Court of the State of Nevada in this matter.

Date: June 10, 1994

Robert C. Downer

Respectfully submitted

Robert C. Downer, pro se